ANTIDUMPING AND COMPETITION LAW: A CRITIQUE

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ABSTRACT

Antidumping is barred by the WTO keeping in mind that other business contemporaries will in the spot of bother and great loss can be occurred. The dumping of the goods or electronic goods or any other similar goods in particular can be hazardous in other way, but the main contention is to protect the market and to keep it healthy. Competition law in India has made a great impact on antidumping strategy by barring it and proving that practice as unlawful.

Competition and antidumping laws come from the same family tree but the two diverge widely. This paper shall attempt to discuss area of divergence and convergence between anti-dumping and competition law on a critical note.

This paper deals with the concept of dumping and its purpose and effects against the competition law. In order to simplify the complexity between the Anti dumping law and competition law the present paper focuses on the main parameters of detecting the flaw and highlighting for the better amendment.

Keywords**:** Antidumping, Competition Law, WTO

INTRODUCTION

Dumping, is a pricing practice where a firm charges a lower price for exporting goods than it does for the same goods sold domestically. It is said to be the most common form of price discrimination in international trade. Dumping can only occur at places where imperfect competition and where the markets are segmented in a way such that domestic residents cannot easily purchase goods intended for export. It is a subtle measure of protection which comes under the non-tariff barriers and is product and source specific. Antidumping duties were initiated with the intention of nullifying the effect of the market distortions created due to unfair trade practices adopted by aggressive exports. They are meant to be remedial and not punitive in nature. A harmful to the domestic producers as their products is unable to compete with the artificially low prices imposed by the imported goods. The process of economic liberalization and institutional reforms which formally began in 1991 has significantly shaped India's transition from a planned economy to a market economy. The substitution of the erstwhile Monopolies and Restrictive Trade Practices Act (MRTP), 1969 by the Competition Act, 2002 is an exercise to facilitate India's transition towards a market economy. The new Competition policy is aimed at promoting and sustaining competition in Indian market and ensuring overall economic efficiency in the wake of a liberalized economy. The process of opening up of markets may pose threat to domestic industries, which may wilt in the wake of increased foreign competition. Such threats from foreign competition may not always be 'fair'. In order to allay these fears, the multilateral framework for trade liberalization under the General Agreement on Tariffs and Trade (GATT) provided for certain contingency measures such as 'antidumping' to protect the domestic industry from 'unfair trade practices' such as 'dumping'. India enacted its frame work of antidumping laws and rules in 1995 in order to give effect to India's commitments under the World Trade Organization (WTO). Since then, India has emerged as one of the most prolific users of antidumping measures in the world.

INTERFACE BETWEEN ANTI-DUMPING LAW AND COMPETITION LAW 1. COMPETITION ACT, 2002 (INDIA): BRIEF INTRODUCTION

The Preamble of the Competition Act, 2002 provides that:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. The Act provides a very wide mandate for the Competition Commission of India to enforce. Apart from it rather broad objective, the Act contains provisions which have rather become standard in the competition jurisdictions all across the globe. These are the provisions relating to anti-competitive agreements, abuse of dominant position and regulation of combinations. In the respect of anti-dumping law the provisions relating to abuse of dominant position and anti- competitive agreements assume importance. In respect of dominant position it is pertinent to note that whereas dominance is not frowned upon by the Competition Act, 2002 abuse of dominance is certainly frowned upon by the legislation. Another significant feature in the context of these provisions of the Act is that anti-competitive agreements and abuse of dominance are to be prohibited by the orders of the Commission whereas the mergers are to be regulated by the orders of the e of Commission. This difference in law is of immense significance. Whereas the former two prevent enhancement of consumer welfare the latter drives economic growth. Hence, the distinction has been maintained.

1. ***Section 4 of Competition Act***

In respect of abuse of dominant position, Section 4 (2) enlists the circumstances when an enterprise shall be considered to be abusing its dominant position. It states:

There shall be an abuse of dominant position under sub- section (1), if an enterprise, -

a) Directly or indirectly, imposes unfair or discriminatory-

1) Condition in purchase or sale of goods or service; or

2) Price in purchase or sale (including predatory price) of goods or service; or

b) limits or restricts

3) Production of goods or provision of services or market therefor; or

4) technical or scientific development relating to goods or services to the prejudice of consumers; or

c) Indulges in practice or practices resulting in denial of market access; or

d) Makes conclusion of contracts subject to acceptance by other parties of supplementary

obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

e) Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

2. ***Abuse of Dominant Position***

One of the most vigorous users of the predominant international trade defense measure, i.e. antidumping duty, India has an unenviable and unfortunate reputation for extreme protectionism being afforded to its domestic industries through the use of anti-dumping investigations and duties. Anti-dumping as an international trade defense measure is by definition protectionist of the Indian market and is based on the following three touchstones:

1. That there is a significant difference between the normal value of a commodity or product and the price at which it is exported to India;
2. That the difference between the normal value and the export price to India greater than certain tolerances is per se evidence of dumping;
3. If this dumping causes or is likely to cause injury to the domestic industry, antidumping duties would be levied.

The effect of anti-dumping duty usually renders the export of the product to India economically unviable. Now, the touchstone of competition law is to avoid an appreciable adverse effect on a relevant market. Quite naturally, the availability of competing products, whatever their source provides wider and more economic options to consumers in the relevant market for a product. A practical example can be considered. Two dominant Indian manufacturers of a product jointly have in excess of half of the domestic production of the product. Under the rules, a petition for imposition of antidumping duties can be filed by the two as being representative of the domestic industry in India. Let us assume that a few smaller domestic players and exports to India by foreign entities constitute the rest of the supply of the product to the market in India.

There is no substantive ideological divergence between anti- dumping law and competition law on the acceptability of the dominant nature of these petitioners. Nothing in competition law disapproves dominance itself as long as it is good. But in case the anti-dumping investigation takes place. This investigation will determine as to whether the users of the product manufactured by the two dominant companies in the market will be left with a reduced choice

and constrain them to purchase willy-nilly from the two dominant companies. The nature of anti-dumping proceedings, the costing method usually resorted to by the petitioners, and the reluctance of foreign exporters to disclose sensitive costing information most often means that establishing a proper normal value and that there is no difference between the normal value and the export price to India is not possible. The result? An overwhelming majority of the recommendations of the antidumping authority are to impose anti-dumping duties, and thus, knock exporters out of the Indian market. Repeatedly, hapless user-consumers of the products have vigorously protested against the imposition of anti-dumping duties on the basis that the same constitutes handing over complete control of the market to a few big domestic industries who, according to them, then proceed to carefully control production volumes, manipulate market prices, refuse to deal, and indulge in whole slew of practices that are blatantly anti-competitive under the competition law. Added to this is the provision under the anti- dumping rules for an exporter to India to provide an undertaking to the authority that it will not sell the product to India at anything under a certain price-surely a prime instance of state-sponsored price-fixing. The Competition Commission should track prices and trends for dominant domestic producers after they have succeeded in obtaining anti- dumping duties on foreign exports. And of course, the suffering user-consumers now have a potentially powerful ally in the New Competition Regime, to whom they are free to complain. But most importantly in the case of our two dominant manufactures and there anti-dumping proceedings several questions arises.

1. Should dominant enterprises be permitted to use the antidumping mechanism to create a pedestal from which to unleash abuses of their dominance?
2. would not some aggrieved consumers be entitled to file a complaint before the Competition Commission that an order imposing antidumping duties has resulted in abuses of dominant position and that the commission ought to take steps to redress the market balance?

Criticism of Antidumping Laws and its effect on Competition

Despite the growing popularity of anti-dumping actions, the theoretical underpinning for anti-dumping actions has been criticized almost universally by economists and scholars. Anti-dumping theory holds that price discrimination is an undesirable practice whereby predatory exporters attack markets by shipping at unfairly low prices, driving local competitors out of business, and accumulating monopoly or oligopoly power. Anti-dumping duties, under this

theory, are necessary to counteract predatory price discrimination by exporters. Economists, academics and government organizations roundly criticize this justification for anti- dumping duties, for a variety of reasons, discussed below.

From the point of view of economics, there is no reason to support any anti-dumping law, since price differentiation across markets is a legitimate and a perfectly rational, sensible and legitimate profit-maximization action. Under this line of argument, there is no justification for condemning certain export prices simply because they happen to be lower than prices in other markets. Domestic price discrimination i.e., differences in pricing between one country's domestic regional markets, normally is not penalized. There arguably is no economic reason for treating "international" price discrimination any more harshly by imposing dumping duties. Of the different categories of dumping, only predatory pricing dumping and most instances of strategic dumping raise overall welfare concerns. Yet, these two forms of dumping pertain largely to the theoretical realm, as most anti-dumping cases in the real world do not involve dumping as defined by these two categories.70 Indeed, in today's trade environment, characterized by increasing competition among a variety of export suppliers from different countries, predatory pricing practices arguably are futile because market domination and monopolistic pricing are not attainable. Economists, therefore, generally take the view that frequent use of anti-dumping action cannot be justified as necessary to prevent predatory pricing

Another common criticism of anti-dumping measures is that they do not afford effective assistance to the domestic industry they are intended to protect. Because of the expansion of international suppliers, a complainant's failure to target all possible suppliers could mean that anti-dumping duties against only some suppliers, even if significant, would merely divert the source of exports to non-targeted countries, without an appreciable price effect in the import market. Moreover, uncompetitive industries are more likely than others to receive protection, and are not likely to benefit from it in the long term.

The anti-dumping protections often come at a substantial cost to consumers. They protect producers at the expense of consumers, which results in higher prices, lower quality products, less consumer choice and a general lowering of the standard of living for the vast majority of people. Anti- dumping measures also destroy more jobs than they created. The costs to the economy of anti-dumping measures are significantly higher than the benefit to the protected domestic industry. Overbroad anti-dumping duties may curtail importation of

products not even produced by domestic companies. The burden and damage to consumer industries dependent on the imported product can be significant and can outweigh any benefits to the upstream complainant industry. The anti-dumping laws are ambiguous and vague. Producers never know by which standard they will be held accountable because there are so many standards. Anti-dumping rules have been implemented and applied by national authorities in an unfair manner, both procedurally and substantively. For example, an OECD study concluded that anti-dumping measures "can be abused for protectionist purposes". Despite the liberalizing changes agreed upon during the Uruguay Round negotiations and adopted in the WTO Anti- dumping Agreement, the study found that "anti-dumping procedures can still serve as a protectionist tool". The way anti-dumping laws are structured, domestic producers can enlist the help of government to prevent foreign competition even when there has been no dumping. The law allows producers to unethically use anti-dumping measures as weapons to batter the competition.

From the point of jurisprudence also, anti-dumping is not justified. From a rights standpoint, anti-dumping laws prevent consenting adults from entering into- contracts at a mutually agreed upon price. Anti-dumping laws cannot be justified by any theory of liberal democracy. They are not utilitarian because they do not result in providing the greatest good for the greatest number. Indeed, they provide well for the minority i.e. producers at the expense of the greatest number

consumers. They reduce rather than enhance social cooperation and harmony. They violate rights. Even redistributionist's' would argue against them because they redistribute income in the wrong direction — from the poor and middle classes to the rich.

It has been argued that imposition of antidumping duties makes little economic sense as it is sort of protection provided to domestic industry against competition from outside rather than action against unfair trade. Economists argue that 'dumping' is a natural phenomenon and is not necessarily 'unfair' as considered under the WTO Antidumping Agreement (as well as the domestic antidumping legislations in the subject countries). From an economic point of view there are two preconditions for a firm in which it can engage in international price discrimination:

1. The firm should have a strong monopolistic - or at least oligopolistic - position in its home market.
2. The firm should be protected from foreign competition in its home market by natural or

artificial barriers to trade.

When these two conditions are met, it is quite natural for firms to dump and is not necessarily 'unfair' practice on the part of the exporting country. Therefore, there does not seem to be any economic justification for antidumping rules that condemn all sales of exports at prices lower than home-market price. Besides the political-economic consideration of protections of the domestic industry there does not seem to be any other plausible reason for continuing with antidumping laws.

Authors like McGee argue that mere existence of antidumping law on statute books encourages foreign suppliers to increase their prices, since by doing so it may be possible to avoid triggering an antidumping action. The mere threat of an antidumping action chills price competition, since foreign suppliers will hesitate to compete too aggressively on price for fear of triggering an antidumping investigation. But no matter how hard they try to avoid such an action, they are not able to totally eliminate the possibility of an antidumping investigation even if they sell their product for the same price worldwide because exchange rate fluctuations can make it appear that they are selling in foreign markets for prices that are below domestic market prices. Also an anti-dumping petition or a threat of petition itself could induce voluntary export restraints by exporting firms, thereby resulting in decreased competition.

It has also been stated that the mere existence of antidumping laws also makes it possible for domestic producers to charge higher prices than would otherwise be possible. That's because antidumping laws make it dangerous for foreign competitors to engage in aggressive price competition. As a result, domestic producers can raise their prices with little fear of being underpriced by foreign suppliers. Thus existence of antidumping law hurts competition both ways, one by forcing exporters to sell at higher prices and other by providing the domestic producers the freedom to charge higher prices than what would be otherwise possible. Thus inherently antidumping law can be said to be protectionist because it benefits domestic producers at the expense of consumers by limiting foreign competition and is thereby in direct conflict with the objectives of competition law. Very often firms misuse antidumping laws by initiating frivolous investigations. This has the effect of raising the cost of doing business for the exporters, apart from leading to efficiency losses. The cost of participating in the investigation process may be very high (in terms of legal fees, time and resources allocated for preparing for the investigation etc.) which raises the cost of doing business. Moreover, studies have shown that once an antidumping investigation is initiated it invariably results in

imposition of antidumping duty. Thus virtually any case that is initiated stands a good chance of getting protection under antidumping laws.

CONCLUSION

The first best option would be to abolish antidumping laws altogether. Governments must attempt to dismantle the antidumping mechanism and merge it with the Competition Law. While this would be preferable, it may not be feasible in practice to pursue it unilaterally. It could be pursued through bilateral agreement or in the context of plurilateral arrangements. Another option would be to follow a strict predation standard in investigating antidumping cases and limit the scope of antidumping to predatory cases alone. This requires a major revision of the definition of dumping and limiting the concept of antidumping to predatory pricing. The third option would be to introduce the "public interest" test. National anti-dumping authorities should consider whether the imposition of anti dumping duty serves the public interest." Public interest" in this context would involve a multitude of factors, such as the interests of domestic producers that are affected by dumped imports, importers of the product, and domestic consumers. Article VI and the Anti-dumping Agreement protect only one interest, namely that of domestic producers. The imposition of anti dumping duty may, however, have a far-reaching effect on other interests in society, such as consumers of the product subject to the anti- dumping duty. In light of this, it seems reasonable to argue that there should be provision in Article VI or in the Antidumping Agreement that domestic anti dumping legislation contain the requirement that the public interest be considered when deciding whether to impose an antidumping duty. This would reintroduce competitive considerations into the antidumping process and change the general mode of practice of the national antidumping authorities. Contrary to antidumping law's supposed primary objective of protecting producers, the "public interest" clause is interpreted as covering user and consumer interests, thus causing the protectionist element of antidumping actions to decline.

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